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No. 91-1856

In the Supreme Court of the United States

OCTOBER TERM, 1992

TRIPLE M DRILLING COMPANY AND GARY MORRISON,
PETITIONERS

v.

KATHRYN SEIDER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of claim preclusion bars petitioners' claims.

2. Whether the lower courts erred in interpreting Texas contract law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Allen v. *McCurry*, 449 U.S. 90 (1980)	5
Bank of El Paso v. *T.O. Stanley Boot Co.*, 809 S.W.2d 279 (Tex. Ct. App. 1991), writ granted (Tex. 1992)	7
Beighley v. *FDIC*, 868 F.2d 776 (5th Cir. 1989)	6-7
Bowen v. *FDIC*, 915 F.2d 1013 (5th Cir. 1990)	6
Bowen v. *Massachusetts*, 487 U.S. 879 (1988)	7
Clay v. *FDIC*, 934 F.2d 69 (5th Cir. 1991)	6
D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942)	3
Gaff v. *FDIC*, 919 F.2d 384 (6th Cir. 1990)	6
Lubrizol Corp. v. *Exxon Corp.*, 871 F.2d 1279 (5th Cir. 1989)	5, 6
Pernie Bailey Drilling Co. v. *FDIC*, 905 F.2d 78 (5th Cir. 1990)	6
Triple M Drilling Co. v. *FDIC*, No. H-89-1511 (S.D. Tex. Aug. 9, 1990), aff'd, 949 F.2d 1158 (5th Cir. 1991), cert. denied, 112 S. Ct. 1938 (1992)	3, 6
University National Bank v. *Ernst & Whinney*, 773 S.W.2d 707 (Tex. Ct. App. 1989)	7
Virginia v. *American Booksellers Ass'n*, 484 U.S. 383 (1988)	7

Statute:

12 U.S.C. 1823(e)	3, 4, 5, 6, 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported, but the judgment is noted at 956 F.2d 265 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1992. The petition for a writ of certiorari was filed on May 15, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioner Triple M Drilling Company (Triple M) obtained a revolving credit line (Note)

from MBank Houston, N.A. (MBank), where Triple M maintained various operating accounts. Pursuant to a security agreement, Triple M pledged certain accounts receivable to secure the Note and agreed that any Triple M deposit account at MBank could be set off against Triple M's indebtedness. Triple M purchased drilling equipment from United States Steel's Oilwell Division (Oilwell), financing these purchases in part by granting Oilwell a lien on Triple M's accounts receivable.

On March 3, 1987, the Note matured by its own terms. On March 25, 1987, Triple M and Oilwell executed a Subordination Agreement under which Oilwell's security interest in Triple M's accounts receivable was subordinated to MBank's security interest in those receivables. The Subordination Agreement's preamble reflects that it was designed "to induce [MBank] to extend or continue to extend credit [to Triple M] from time to time, and/or make or continue to make loans, advances, payments or other financial accommodations." Pet. 8. Nothing in the Subordination Agreement provides for extension of the Note or a new maturity date. To the contrary, the Subordination Agreement expressly reserves to MBank all of its rights against Triple M. Pet. App. 7a.

Subsequently, on May 15, 1987, nearly ten weeks after the Note matured, MBank exercised its right under the Note to offset the Triple M deposit account against Triple M's indebtedness; in addition, MBank notified Triple M's debtors to make payments directly to MBank, which was also a right expressly reserved to it under the terms of the Note. Pet. 4-5.

2. The present action is the second of two suits brought by Triple M based on the same agreements and events. In the first suit, Triple M and its officers

brought breach of contract, breach of a duty of good faith and fair dealing, and fraud claims against the Federal Deposit Insurance Corporation as Receiver for MBank Houston, N.A. (FDIC as Receiver). The district court determined that those claims were barred by 12 U.S.C. 1823(e)[1] and the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). See *Triple M Drilling Co.* v. *FDIC*, No. H-89-1511 (S.D. Tex. Aug. 9, 1990), aff'd, 949 F.2d 1158 (5th Cir. 1991) (Table), cert. denied, 112 S. Ct. 1938 (1992) (*Triple M I*).[2]

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[1] 12 U.S.C. 1823(e) (Supp. I 1989) provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement:
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

[2] The *Triple M I* district court disposed of several other claims on different grounds. The court ruled that Triple M's officers lacked standing to bring Triple M's claims for commercial disparagement, fraud, breach of good faith, and tortious interference. The court also dismissed the officers' claims for defamation and intentional infliction of emotional distress because they were unsupported by either the allegations or the summary judgment evidence. Finally, the district

3. The allegations in the present action parallel those made in *Triple M I*. Petitioners claim that MBank's officers were guilty of breach of contract, breach of a duty of good faith and fair dealing, and fraud. The only distinction between the present case and *Triple M I* is that the defendants here are MBank's officers, who then filed a third-party petition against the FDIC as Receiver seeking indemnity or contribution for any damages awarded against them. The district court granted summary judgment to the officers and the FDIC, holding that the language in the preamble to the Subordination Agreement did not effect an extension of the due date of the Note. Pet. App. 3. The district court based its ruling solely on interpretation of the Subordination Agreement and did not apply either the *D'Oench* doctrine or 12 U.S.C. 1823(e). Pet. App. 5a-6a.

4. The court of appeals affirmed. Pet. App. 1a-8a. The court found that all but one of petitioners' claims against MBank's officers were barred by claim preclusion because they had previously been brought against the FDIC as Receiver in *Triple M I*. Because the actions complained of fell within the scope of the officers' employment with MBank, the court found identity of parties for purposes of claim preclusion. Pet. App. 5a-6a. The court of appeals did not address the applicability of *D'Oench* or Section 1823(e).

The court determined that petitioners' claim for tortious interference with contract was not barred by claim preclusion, but rejected that claim on the

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court dismissed Triple M's claim for tortious interference with contract, finding that MBank had a bona fide right under the Note to offset the Triple M account and notify Triple M's customers to send payments directly to the bank.

merits. That claim was premised on petitioners' contention that the preamble language in the Subordination Agreement extended the Note's due date. The court of appeals found, however, that under Texas contract law the Subordination Agreement could not be given that reading as a matter of law. Because nothing in the preamble language or any other part of the Subordination Agreement identified the Note, provided for its extension, or referenced a new maturity date, that agreement could not be deemed "an agreement to extend the revolving note." Pet. App. 5a-7a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is accordingly unwarranted.

1. Petitioners contend that the courts below misapplied the *D'Oench* doctrine and Section 1823(e) in ruling that the Subordination Agreement's preamble did not extend the Note's due date. Pet. 3, 7. To the contrary, the lower courts did not even rely on the *D'Oench* doctrine or Section 1823(e). Rather, they concluded that petitioners' claims (with one exception) had already been litigated and were therefore barred by claim preclusion.[3] The *Triple M I* court concluded that Triple M's claims against the FDIC (as receiver for MBank) for breach of contract,

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[3] Claim preclusion prevents parties to a prior proceeding, or those in privity with them, from relitigating claims that were subject to a final judgment on the merits by a court of competent jurisdiction. *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Lubrizol Corp.* v. *Exxon Corp.*, 871 F.2d 1279, 1287 (5th Cir. 1989).

breach of good faith and fair dealing, and fraud were barred by *D'Oench* and Section 1823(e).[4] This Court recently denied certiorari in that case. *Triple M Drilling Co.* v. *FDIC*, No. H-89-1511 (S.D. Tex. Aug. 9, 1990), aff'd, 949 F.2d 1158 (5th Cir. 1991) (Table), cert. denied, 112 S. Ct. 1938 (1992). In the instant case, the court of appeals properly concluded that virtually all of petitioners' claims were merely an attempt to relitigate claims they had unsuccessfully pressed in *Triple M I*. Because petitioners have not challenged the court of appeals' finding that claim preclusion applies,[5] but instead seek this

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[4] In *Triple M I*, petitioners argued unsuccessfully that inferences of an agreement to extend the Note's maturity date could be drawn from the Subordination Agreement and other extrinsic evidence. That argument failed because a claimed inference of an agreement drawn from bank documents cannot withstand either the *D'Oench* doctrine or Section 1823(e). *Clay* v. *FDIC*, 934 F.2d 69, 73 (5th Cir. 1991); *Bowen* v. *FDIC*, 915 F.2d 1013, 1016-1017 (5th Cir. 1990) (the FDIC need not search a failed bank's documents for inferences and hidden duties).

[5] It is clear, in any event, that the court of appeals was correct in concluding that claim preclusion was applicable in this case. The only conceivable difference between the present case and *Triple M I* is the identity of the defendants. The court of appeals correctly concluded, however, that identity of parties existed, based on privity, because the actions complained of were performed within the scope of the officers' duties as MBank employees. Pet. App. 5a-6a. See *Lubrizol*, 871 F.2d at 1288 ("employer-employee or principal-agent relationships may ground a claim preclusion defense, regardless which party to the relationship was first sued"). In addition, claims arising from actions by a failed depository institution and its agents are enforceable only against the receiver. See *Gaff* v. *FDIC*, 919 F.2d 384, 394 (6th Cir. 1990); *Pernie Bailey Drilling Co.* v. *FDIC*, 905 F.2d 78, 80 (5th Cir. 1990); *Beighley* v. *FDIC*, 868 F.2d 776, 779-780 n.7 (5th Cir.

Court's review on the same issues that were raised in *Triple M I*, there is no basis for further review by this Court.

2. Rather than finding Triple M's claim for tortious interference with contract to be barred by claim preclusion, the court of appeals rejected that claim on the merits as a matter of Texas state law. In light of this Court's "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988), the court of appeals' resolution of the tortious interference with contract claim does not warrant this Court's review. See also *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988).

In any event, the court of appeals was correct. In short, the court rejected petitioners' contention that the Subordination Agreement extended the due date of the Note because the agreement lacked any language to that effect. Nothing in the preamble or any other part of the Subordination Agreement identified the Note, provided for its extension, or referenced a new maturity date. Even assuming that Triple M and MBank meant to extend the Note, under Texas law the failure to include those essential terms rendered the agreement unenforceable as a matter of law. *Bank of El Paso* v. *T.O. Stanley Boot Co.*, 809 S.W.2d 279 (Tex. Ct. App. 1991), writ granted (Tex. 1992); *University National Bank* v. *Ernst & Whinney*, 773 S.W.2d 707 (Tex. Ct. App. 1989).[6] Finally, the court

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1989). Since the receiver is the only appropriate defendant for all of petitioners' claims, identity of parties exists for purposes of claim preclusion.

[6] Moreover, even if petitioners were correct that the Subordination Agreement was ambiguous and its interpretation

noted that Triple M conceded in its pleadings that MBank had expressly refused to sign an extension of the Note during negotiation of the Subordination Agreement. Pet. App. 7a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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was a matter for the jury, the agreement would necessarily be unenforceable against the FDIC as receiver for MBank under the doctrine of *D'Oench* and Section 1823(e).

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